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FOR ARGUMENT

Nos. 02-1845 & 03-83

Supreme Court, U.S.
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In The
Supreme Court of the United States

AETNA HEALTH, INC.,

Petitioner,

v.

JUAN DAVILA,

Respondent.

CIGNA HEALTHCARE OF TEXAS, INC.,

Petitioner,

v.

RUBY R. CALAD, *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF UNITED POLICYHOLDERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICUS CURIAE*

United Policyholders is a national, not-for-profit educational organization whose mission is to educate the public, legislators and the courts on insurance issues and consumer rights, and to assist policyholders in securing prompt and fair insurance settlements.[1] The resolution of the issue presented in this case is of great importance to United Policyholders and its members because of its potential application to a wide range of laws affecting employees insured through an ERISA plan.

SUMMARY OF ARGUMENT

In *Difelice v. Aetna U.S. Healthcare,* 346 F.3d 442, 453 (3rd Cir. 2003), Justice Becker writes in concurrence, "I write separately to add my voice to the rising judicial chorus urging that Congress and the Supreme Court revisit what is an unjust and increasingly tangled ERISA regime." *Id.* at 453. We submit that the root of the innumerable difficulties that have plagued the Courts is language from this Court's decision in *Pilot Life v. Dedeux,* 481 U.S. 41 (1987). Petitioners have urged this Court to extend that dicta and apply it to the circumstances here. We urge the Court to resist such an extension of *Pilot Life,* which we posit cannot withstand either scrutiny or logic in light of all that has transpired since its issuance. Indeed, *Pilot Life's* dicta has required federal courts to "struggle mightily to maintain fidelity to ERISA's expansive"[2]

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[1] United Policyholders, as *amicus curiae*, has obtained the consent of both the Petitioner and the Respondents to submit this brief. The letters of consent have been lodged with the Clerk of the Court. No counsel for any party in this case authored this brief in whole or in part, and no person or entity other than United Policyholders and its members made any monetary contribution to the preparation or submission of this brief.

[2] *Difelice* 346 F.3d at 54 (Becker, J., concurring.)

preemption while continuing to respect the rights of states to regulate insurance.

This Court has courageously remarked on prior occasions that its initial take on ERISA preemption has not always been accurate and has stepped forward to correct itself on more than one occasion. *See Kentucky Association of Health Plans, Inc. v. Miller,* 538 U.S. 329, 123 S.Ct. 1471 (2003) (making a clean break from past criteria used to determine whether a law regulates insurance within scope of saving clause); *California Division of Labor Standards Enforcement v. Dillingham Construction N.A., Inc.*, 519 U.S. 316, 335 (1997) (ERISA preemption criteria set forth in some of the court's earlier cases, including *Pilot Life,* have "in effect been abandoned" as "a project doomed to failure" (Scalia, J., concurring); *N.Y. State Conference of Blue Cross & Blue Shield v. Travelers Ins. Co.,* 514 U.S. 645, 655 (1995) (recognizing that prior attempts at construing the phrase "relate to" in preemption clause "does not give us much help . . .").

United States Senior District Judge Newcomer has recently found *Pilot Life's* reasoning "unpersuasive" and "flawed" in important respects. *Rosenbaum v. Unum Life Ins. Co. of America*, 2003 WL 22078557 (E.D. Pa.). *See also Stone v. Disability Management Services, Inc.,* 288 F. Supp.2d 684, 695-96 (2003) (noting "persuasive" reasoning of *Rosenbaum*). As Justice Becker proposes, the inequities inherent in ERISA, as interpreted thus far by the courts, "cry out for clarification by Congress or, failing that, by the Supreme Court. . . . The time might be right [for the Supreme Court] to reconsider its prior rulings." *Id.* at 461, 465. And Justice Calabresi in *Cicio v. Does,* 321 F.3d 83, 106 (2d Cir. 2003), writes, " . . . the injury that the courts have done to ERISA will not be healed until the Supreme Court reconsiders the existence of consequential damages under the statute, or Congress revisits the law to the same end." (Calabresi, J. dissenting in part.)

In *Pilot Life*, this Court held that ERISA preempted a state law claim for tortious breach of contract arising from an insured ERISA disability benefits plan. The Court

found that the state law claim related to ERISA and was not saved from preemption because the Mississippi law was not aimed specifically at the insurance industry.[3] As part of the Court's analysis of the saving clause issue in *Pilot Life*, and in accordance with the views of the Solicitor General, it relied upon the structure and legislative history of the civil enforcement provisions contained in ERISA Section 502 to bolster its conclusion that Congress intended ERISA to preempt the state law remedy at issue in that action. *Pilot Life*, 481 U.S. at 51-52.

This Court has recently pointed out that *Pilot Life* does not resolve Section 502's impact on laws encompassed by the saving clause. *See Rush Prudential HMO Inc. v. Moran*, 536 U.S. 355, 377 (2002) ("we have yet to encounter a forced choice between the congressional policies of exclusively federal remedies and the 'reservation of the business of insurance to the States,'"); *UNUM Life Insurance Co. of Am. v. Ward*, 526 U.S. 358, 377 n.7 (1999) ("[This] case does not raise the question whether § 1132(a) provides the sole launching ground for an ERISA enforcement action"; *Pilot Life's* holding was "in the context" of a law which was not saved from preemption). Further, in *Franchise Tax Board of California v. Construction Laborers Vacation Trust for Southern Cal.*, 463 U.S. 1, 25 (1983), this Court clearly held that "[the saving clause] makes clear that Congress did not intend to preempt entirely every state cause of action relating to" ERISA plans. In addition, the Solicitor General has specifically pointed out that the Section 502 implied preemption analysis it presented in *Pilot Life* would not apply in a case where the state law remedy at issue was a state law regulating insurance. *Ward*, 526 U.S. 358, 377 n.7. Moreover, the

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[3] This holding in *Pilot Life* was substantially modified in *Kentucky Association of Health Plans, Inc. v. Miller,* 538 U.S. 329, 123 S.Ct. 1471, 1478-79 (2003) in which this Court made a clean break from the criteria used in *Pilot Life,* to determine whether a law regulated insurance within the meaning of the saving clause.

limited application of *Pilot Life's* Section 502 implied preemption analysis is reflected in the Court's final sentence: " . . . [W]e conclude that Dedeaux's state law suit asserting improper processing of a claim for benefits under an ERISA-regulated plan is not saved by [the saving clause] *and therefore* is pre-empted by [the preemption clause]." *Pilot Life*, 481 U.S. at 57 (emphasis added).

In *Pilot Life* the Court notes that the remedial provision of ERISA was intended to represent the exclusive remedies available to an ERISA plan participant and thus, the state law at issue was preempted to the extent it provided a remedy not authorized under ERISA. *Pilot Life,* 481 U.S. at 54. Petitioners urge the Court to extend that reasoning to apply even if the law at issue is saved from preemption. Critically, however, the reasoning this Court used in *Pilot Life* only applies to laws of general application and does not logically extend to laws that fall within the saving clause. ERISA's clear purpose, when enacted, was to regulate pension and not insurance difficulties and the statute is clear on its face that the saving clause is not affected by Section 502. In addition, the remedies provided under ERISA are not suited to insurance disputes and there is nothing in the legislative history of ERISA which would constitute a clear and manifest intent of Congress that the saving clause be subservient to Section 502. Eminent jurists and commentators have also concluded that an extension of *Pilot Life*, as advocated by Petitioners here, strains all logic in both the interpretation of ERISA as well as its practical application. They urge this Court, as we do, to limit the effect of *Pilot Life*.

ARGUMENT

I. *All* Laws Which Regulate Insurance Are Saved From Preemption Pursuant To The Clear And Unambiguous Text Of ERISA.

ERISA was enacted as a pension reform bill intended to protect the retirement benefits of workers. *Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85, 90 (1983); 29 U.S.C. § 1001(b). Protecting "the continued well-being and

security of millions of employees and their dependents" was an express Congressional declaration of policy. 29 U.S.C. § 1001. ERISA comprehensively regulates pension plans. Importantly, ERISA does not comprehensively regulate the terms of non-pension employee benefit plans.[4]

In addition to its substantive provisions, ERISA includes a preemption clause, which provides that, "except as provided in [the saving clause, ERISA] . . . shall supersede any and all State laws insofar as they . . . relate to any employee benefit plan. . . ." ERISA § 514(a), 29 U.S.C. § 1144(a). This Court has described the preemption clause as "expansive."[5] However, the preemption clause is modified by the saving clause, which declares " . . . nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance . . ." ERISA § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A). This saving clause is "phrased with similar breadth"[6] as the preemption clause.[7]

A remedial provision is found in the same subchapter as the preemption and saving clauses. ERISA Section 502, 29 U.S.C. § 1102, contains a set of remedies available under ERISA to plan participants. Thus, on the face of the statute, all remedies available under ERISA would constitute the exclusive remedies, unless a state remedial law was saved from preemption. In that event, "*nothing* in this

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[4] *See* Donald T. Bogan, *Protecting Patient Rights Despite ERISA: Will the Supreme Court Allow States to Regulate Managed Care?* 74 Tul. L. Rev. 951 (2000) (hereafter, Bogan, *Protecting Patient Rights*).

[5] *See New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.,* 514 U.S. 645, 655 (1995); *Pilot Life,* 481 U.S. at 46.

[6] *Unum Life Ins. Co. of America v. Ward,* 526 U.S. 358, 363 (1999).

[7] *Ward,* 526 U.S. at 363 ("[P]re-emption is substantially qualified by an 'insurance saving clause,' . . . which broadly [saves state insurance laws]. . . ."); *Metropolitan Life Ins. Co. v. Massachusetts,* 471 U.S. 724, 740-741 (1985) (" . . . [W]hile the general pre-emption clause broadly preempts state law, the saving clause appears broadly to preserve the States' lawmaking power over much of the same regulation").

subchapter," which by definition includes Section 502's remedial provisions "*shall* [preempt] . . . *any* . . . State [law which] regulates insurance." (Emphasis added.) Accordingly, any state law that regulates insurance, regardless of whether it creates a remedy or not is saved from preemption.

Issues of statutory construction turn on Congress' intent.[8] The Court must "begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose."[9] Further, the Court must also presume that Congress did not intend to preempt areas of traditional State regulation.[10]

Not only is insurance an area of traditional State regulation, but Congress has specifically designated insurance as a special area of State regulation to be zealously protected from federal regulation. The McCarran-Ferguson Act provides that federal laws shall not be interpreted to supersede state laws regulating the business of insurance. 15 U.S.C. § 1012(b); *Humana, Inc. v. Forsyth,* 525 U.S. 299, 306 (1999). "Congress' 'primary concern' in enacting McCarran-Ferguson was to ensure the States' continued ability to regulate the business of insurance." *Metropolitan Life Ins. Co. v. Massachusetts,* 471 U.S. 724, 744 n.21 (1985). And the ERISA saving clause was designed to preserve the McCarran-Ferguson Act's reservation of the business of insurance to the States. *Id.; Ward,* 526

[8] *See Travelers*, 514 U.S. at 655.

[9] *FMC Corp. v. Holliday*, 498 U.S. 52, 57 (1990), *citing Park'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 194 (1985).

[10] *See Travelers*, 514 U.S. at 655. ("We have never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law. Indeed, in cases . . . where federal law is said to bar state action in fields of traditional state regulation, we have worked on the 'assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress' ") (citations omitted).

U.S. at 375 n.5. Moreover, "[t]here is no discussion in [the legislative] history [of ERISA] of the relationship between the general pre-emption clause and the saving clause, and indeed very little discussion of the saving clause at all." *Metropolitan Life*, 471 U.S. at 745. This Court therefore "decline[d] to impose any limitation on the saving clause beyond those Congress imposed in the clause itself . . . If a state law 'regulates insurance,' . . . it is not pre-empted. Nothing in the language, structure, or legislative history of the Act supports a more narrow reading of the clause. . . ." *Id.* at 746-47.

Given the unambiguous language of the saving clause and the strong prohibitions against preemption of state insurance laws, the conclusion that a state law that falls within the saving clause is still preempted would require a clear and manifest expression of Congressional intent. Yet, as extensively discussed below, there is nothing in either the statute or the legislative history of ERISA even to suggest such an intent, let alone a clear and manifest intention.

II. A Claim That *Pilot Life's* Exclusive Remedy Analysis Should Be Extended To Laws Which Are Saved From Preemption Is Deeply Flawed.

A. The Structure Of ERISA, Including Section 502, Establishes That Congress Did Not Intend To Preempt State Remedial Laws That Are Saved From Preemption.

In *Pilot Life*, this Court stated that Congress intended that all claims arising from an ERISA-governed employee benefit plan which fall within the ambit of ERISA Section 502 must be pursued exclusively through ERISA.[11] This Court founded its conclusion on two factors: (1) the structure of ERISA itself and (2) ERISA's legislative history and, in

[11] *Pilot Life*, 481 U.S. 41.

particular, reference in that history to the preemptive scope of Section 301 of the Labor-Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 185. Regarding the structure of ERISA, the Court held that the ERISA remedies represented a comprehensive enforcement scheme, which, in light of ERISA's broad preemption clause, was intended to be exclusive. The Court determined that parties were not "free to obtain remedies under state law that Congress rejected in ERISA." *Pilot Life,* 481 U.S. at 54.

It is certainly true that Section 502 contains a comprehensive enforcement scheme. However, the saving clause is a fundamental element of that comprehensive scheme. One cannot merely presume that, because Section 502 is comprehensive, that it was intended to prevail over the saving clause in the event of a conflict. Surely Congress was aware that, in order to accomplish such a result, it only need have included in the saving clause language providing that all such laws were saved "except laws providing remedies other than those set forth in Section 502." Or it could simply have prefaced the saving clause with, "except as provided in Section 502." Or it could have invoked a multitude of other ways to make itself clear. Indeed, if there was such a clear and manifest intent of Congress to have Section 502 trump Section 514, it is hard to fathom why Congress did not include such an easy clause in the language of the statute itself.

We must also ask ourselves the question, "If we presume that Congress intended to save from preemption all laws regulating insurance – even laws providing additional remedies – could Congress have expressed its intent more clearly than it did in the statute itself?" The short answer is that it would be hard to imagine language that was more explicit. The statute itself provides that the saving clause supersedes both the preemption clause and the remedial provisions in the event of a conflict.

While the Court's conclusion in *Pilot Life* can be applied to generally applicable state law remedies, or more importantly, to laws affecting pension benefits, the same is not true of laws which fall within the specific Congressionally-carved

exception, which saves laws regulating insurance. Congress did not "reject" remedies specifically provided for within the confines of the saving clause. On the contrary, such laws were specifically saved, not rejected. Further, the saving clause is fundamental to the structure of the Act. It provides that " . . . *nothing* in this subchapter shall be construed to exempt or relieve any person from *any* law of any State which regulates insurance. . . ." 29 U.S.C. § 1144(b)(2)(A) (emphasis added). Not only are the remedies contained in the same subchapter as the saving clause (remedies in 29 U.S.C. § 1132 saving clause in 29 U.S.C. § 1144), but the saving clause is in the very same statute as the preemption clause (29 U.S.C. § 1144).

The Solicitor General, upon whom this Court relied in *Pilot Life,* has also questioned this Court's suggestion in *Pilot Life* that ERISA Section 502 was intended to be exclusive of all state law remedies. In his amicus brief to the Court in *Ward*, he suggested that this Court should reconsider this part of the *Pilot life* opinion. Br. of United States as *Amicus Curiae* in *Ward*, No. 97-1868 (November 1998) at 7, 20-25.

> We recognize that *Pilot Life* has been read to preclude even state law causes of action arising under laws that "regulate[ ] insurance." That portion of *Pilot Life's* rationale is, however, in significant tension with the text of the insurance savings provision and was unnecessary to *Pilot Life* 's holding that the law at issue there was not in any event an insurance regulation within the meaning of that provision.
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> * * *
>
> We do not question [the exclusive remedy] reasoning in *Pilot Life* as a general matter. Unquestionably, "Congress intended § 502(a) to be the exclusive remedy for rights guaranteed under ERISA." [Citations omitted.] And it is certainly true that, outside the context of state laws that "regulate insurance" within the meaning of the ERISA insurance savings clause, that exclusivity of the Section 502 civil enforcement provisions

also appropriately informs the Court's understanding of the scope of ERISA preemption where a plaintiff brings a cause of action under state law that "relates to" an ERISA plan. [Citation omitted.] Congress, in short, clearly intended the remedial provisions of ERISA to be exclusive of any generally applicable state-law remedies related to ERISA plans. [Citations omitted.]

It does not follow, however, that ERISA Section 502 should inform the preemption inquiry to the same extent with respect to a state-law cause of action or remedy that specifically "regulates insurance" as it does with respect to one of general applicability. In that situation, Congress has saved state substantive law, and it is not clear why Congress would have wanted to foreclose all access to state-created remedies or sanctions to enforce that substantive law, *see, e.g., Metropolitan Life*, 471 U.S. at 734 (suit by state Attorney General against insurer of ERISA plans to enforce provision of state insurance law), especially where the causes of action provided under Section 502 itself are not suited to that purpose.

The savings clause states that "nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance." 29 U.S.C. § 1144(b)(2)(A) (emphasis added). "[T]his subchapter" includes Section 502, which has been construed to provide exclusive remedies under ERISA, as well as the preemption provision itself, Section 514(a). Accordingly, the savings clause by its terms directs that nothing in Section 502, which concerns causes of action and remedies under ERISA, shall be "construed" to relieve or exempt any person from "any law" of a State that regulates insurance. Thus, the insurance savings clause, on its face, saves state law conferring causes of action or affecting remedies that regulate insurance, just as it does state-mandated benefits laws and other prescriptive measures that do so.

This Court gave effect to the facially unrestricted scope of the insurance savings clause in *Metropolitan Life*, when it "declin[ed] to impose any limitation on the saving clause beyond those Congress imposed in the clause itself and in the 'deemer clause' which modifies it," and concluded that "[i]f a state law 'regulates insurance,' as mandated-benefit laws do, it is not preempted." 471 U.S. at 746; *cf. Pilot Life*, 481 U.S. at 56-57 (*Metropolitan Life* clearly "rejected an interpretation of the [insurance] saving clause . . . that saved from preemption 'only state regulations unrelated to the substantive provisions of ERISA'"). In addition, the force of the savings provision's express terms is reinforced by the Court's frequent recognition – particularly in recent cases – that ERISA's preemption provisions must be read against the background of the "assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." [Citations omitted.]

Ward Br. at 20, 22-25 (footnotes omitted).

As the Solicitor General has carefully explained, the structure of ERISA and, in particular, Section 502 cannot serve as the clear and manifest intent of Congress required to override the clear terms of the saving clause itself. Moreover, a further look into the structure of the remedial provisions discloses powerful evidence that Congress did *not* intend the remedial provisions to prevail over the saving clause.

To the extent ERISA is implicated, the disputes here – and in nearly all the matters impacted by *Pilot Life* – are, at bottom, insurance disputes between insureds and his/her insurance company (or HMO). Logic would dictate that such disputes be resolved in a lawsuit between an insured on the one hand and the insurer or HMO on the other hand. However, ERISA's remedial provision is not set up that way. There is a third party, which is inexplicably inserted into the middle of the dispute. This is the

ERISA plan itself. ERISA requires that an action to recover benefits must be brought against the plan as an entity. "Any money judgment ... against an employee benefit plan shall be enforceable *only against the plan* as an entity and shall not be enforceable against any other person. . . ." 29 U.S.C § 1132(d)(2) (emphasis added). Thus, ERISA does not permit a suit against the insurer, which owes the benefits. "ERISA permits suits to recover benefits only against the Plan as an entity." *Gelardi v. Pertec Computer Corp.*, 761 F.2d 1323, 1324 (9th Cir. 1985); *Garratt v. Knowles*, 245 F.3d 941, 949 (7th Cir. 2001). Because of this, courts have repeatedly held insurers are not proper parties to an action under ERISA and have repeatedly dismissed actions filed against insurers.[12]

In the context of a welfare benefit plan in which the only benefit is the purchase of insurance, such a procedures makes no sense in a dispute between an insured and an insurer. A suit against the plan is, at best, a very odd procedure. The plan is not really an entity at all. It is a creation of ERISA and may exist without any documentation, any employees, any office or any funds.[13] Indeed, it can be created as a matter of law without the expressed intention or documentation of anyone.[14] Why would Congress insist that an action for insurance benefits must be

[12] *See, e.g., Everhart v. Allmerica Financial Life Ins. Co.*, 275 F.3d 751, 754 (9th Cir. 2001), *cert. denied*, 536 U.S. 958 (2002); *Gibson v. Prudential Ins. Co. of N. Am.*, 915 F.2d 414, 417 (9th Cir. 1990); *Roeder v. Chemrex, Inc.*, 863 F. Supp. 817, 828 (E.D. Wis. 1994); *Cohen v. Equitable Life Ass. Soc. of the United States*, 196 Cal.App.3d 669, 672-73 (1987).

[13] *See, e.g., Gaylor v. John Hancock Mutual Life Ins. Co.*, 112 F.3d 460, 463-65 (10th Cir. 1997) (ERISA plan determined from surrounding circumstances); *Butero v. Royal Maccabees Life Ins. Co.*, 174 F.3d 1207, 1213-15 (11th Cir. 1999) (same); *Donovan v. Dillingham*, 688 F.2d 1367, 1373 (11th Cir. 1982) (written plan not necessary to establish ERISA plan); *Marshall v. Bankers Life & Cas. Co.*, 2 Cal. 4th 1045, 1054, 832 P.2d 573 (1992) (same).

[14] *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1352 (9th Cir. 1984).

filed against an entity, which exists in name only, but, in reality, has no assets or personnel? Indeed, in these circumstances, all of the claims decisions are delegated by contract to the insurance company and thus an action by the claimant against the insurer is the obvious manner of resolving such disputes. State courts have been resolving exactly that kind of insurance claim for over 200 years. The "plan" really has no role whatsoever in resolution of the dispute. Yet, under ERISA's structure, in order to obtain benefits, an insured must proceed against the plan and, presumably, if a judgment is entered against the plan, force a second action by the plan against the insurer to obtain the amount of the judgment from the insurer. This is a highly cumbersome and illogical method of obtaining insurance benefits. It is hard to imagine why Congress would impose such a burdensome procedure on a claim that is between an insured and an insurer.[15]

An action solely against the plan does make sense in the case of pension plans and self-funded plans, which are not subject to ERISA's saving clause. These plans are subject to ERISA's substantive provisions regarding vesting and financing. An action directly against such plans makes sense because those plans actually have funds and personnel administering those funds. Thus, ERISA's requirement that a monetary award can only be satisfied

[15] Some courts have held, without statutory authority, that the administrator who controls the plan may be sued. *See, e.g., Garren v. John Hancock Mut. Life Ins. Co.*, 114 F.3d 186, 187 (11th Cir. 1997); *Rosen v. TRW, Inc.*, 979 F.2d 191, 193 (11th Cir. 1992). While insurers are not generally administrators as defined by ERISA (29 U.S.C. § 1002(16)(A)(i)) some courts have still suggested that an insurer may be sued if the claimant can establish that the insurer was the administrator. *See Moran*, 536 U.S. at 363, n.3; *Everhart v. Allmerica Financial Life Ins. Co.*, 275 F.3d 751, 754 (9th Cir. 2001), *cert. denied*, 536 U.S. 958 (2002). Nonetheless, it is highly improbable that the drafters of ERISA would have left an insured's right to sue an insurer dependent on the question of whether the insurer functioned as an administrator – an issue the appellate courts still have not resolved or clarified nearly 30 years after ERISA was enacted.

against the plan, thereby immunizing the administrators from personal liability, makes perfect sense. However, ERISA provides no substantive protections for welfare plans. It, therefore, made sense for Congress to permit these substantive protections to be enforced in state actions directly against insurers through the saving clause. It would make little sense for Congress to have intended that insureds jump through the complicated hoops designed to apply effectively to funded plans, but not designed to work in connection with unfunded plans. Similarly, there is no reason for Congress to have left substantive regulations to the states, but preempted the states' procedures to enforce those rights.

Further evidence of this is found in this Court's jurisprudence. ERISA was intended to "safeguard employees from the abuse and mismanagement of *funds* that had been accumulated to finance various types of employee benefits." *Massachusetts v. Morash,* 490 U.S. 107, 113 (1989) (emphasis added). Congress was concerned with the need of *employers* to be able to rely on uniform laws, rather than individual state laws. *Moran*, 536 U.S. at 378-79. Once again, this has applicability to funded plans, but not to disputes among third-party insurers and insureds. That liability does not rest with the employer, but with the insurer. In any event, ERISA specifically contemplates that disuniformities for national insurance plans will necessarily occur as a result of the saving clause. *Ward*, 526 U.S. at 376, n.6.

Moreover, this Court has repeatedly made clear that insurance enforcement mechanisms and laws regulating claims practices are at the core of McCarran-Ferguson and thus ERISA's saving clause. *Kentucky Association*, 123 S.Ct. at 1478, n.3 ("notice-prejudice" rule discussed in *Ward* fell within saving clause because it directly affected insurer's claims processing function.); *Ward,* 526 U.S. at 374 n.5 (stating that "laws regulating claims practices . . . [are included] in catalogue of state laws that regulate insurance."); *Metropolitan Life,* 471 U.S. at 744 (type of state regulation encompassed by McCarran-Ferguson, includes "enforcement").

Thus, a careful look at the structure of the remedial provisions of ERISA shows, if anything, that the act was intended to be enforced exactly as written – i.e., that all state laws regulating insurance, including remedial laws, are saved from preemption. This is entirely consistent with ERISA's purpose. ERISA imposes substantive regulations on, and provides direct actions against, funded plans. Yet, it does not provide substantive regulations against unfunded welfare plans and thus permits direct state actions against the parties ultimately responsible for the payment of benefits. This is also consistent with the long-standing principles of field preemption, whereby Congress does not intend to completely preempt a field without inserting substantive federal regulations in place of the existing state regulations.

B. Nothing In The Legislative History Supports A Conclusion That Congress Intended To Preempt State Remedial Laws That Are Saved From Preemption.

Pilot Life also discussed ERISA's legislative history. Yet, as set forth at length below, there is nothing in the legislative history of the Act to support a conclusion that ERISA was intended to preempt remedies that were explicitly saved from preemption. The principle piece of legislative history referred to in *Pilot Life* is the Conference Report's reference to the Labor-Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 185. 481 U.S. at 55. The *Pilot Life* Court found this statement to reflect Congress' intent to compare ERISA's preemptive effect with the powerful preemptive force of Section 301 of the LMRA. *Id*. Once again, this may apply with regard to laws of general applicability or laws relating to funded pension benefits; however, it has no bearing with respect to a law that falls within the saving clause. The LMRA has no saving clause and thus is not comparable legislation when addressing a law that is specifically saved from preemption. Indeed, this Court has made this very point.

This Court has repeatedly pointed out that the saving clause is just as broad as the preemption clause. *Ward*, 526 U.S. at 363; *Metropolitan Life*, 471 U.S. at 733. Thus, the remedial clause cannot serve to trump the saving clause simply because of reference in the legislative history to the LMRA.

> The phrasing of § 502 [ERISA's remedial provision] is instructive. . . . It does not purport to reach every question relating to plans covered by ERISA . . . *Furthermore, § 514(b)(2)(A) of ERISA [the savings clause] makes clear that Congress did not intend to preempt entirely every state cause of action relating to such plans.* With important, but express limitations, it states that 'nothing in this subchapter shall be construed to relieve any person from any law of any State which regulates insurance, banking, or securities.' *In contrast*, § 301(a) of the LMRA applies to all 'suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . or between any such labor organizations.'

Franchise Tax Board of State of California v. Construction Laborers Vacation Trust for Southern Cal., 463 U.S. 1, 25 (1983) (emphasis added).

Even the *Pilot Life* decision makes this clear. In citing to the legislative history, the Court quoted one of the bill's sponsors, Senator Williams, as follows: *"[W]ith the narrow exceptions specified in the bill*, the substantive and enforcement provisions of the conference substitute are intended to preempt the field. . . ." 481 U.S. at 46 (emphasis added). Manifestly, the saving clause is the principal exception.[16] Moreover, Senator Williams' statement, as well

[16] Reference in Senator Williams' remarks to the "narrow" exception is "far too frail [to] support" a restricted reading of the saving clause. *Metropolitan Life*, 471 U.S. at 746.

as those of the other sponsors of the bill,[17] were made in the context of the intended purpose of the Act as pension reform legislation.

Once again, the Solicitor General is in agreement with this view. The Solicitor General concluded its discussion in its *Ward* brief by pointing out that this Court's reference in *Pilot Life* to the portion of ERISA's legislative history relating to Section 301 of the LMRA "does not bear directly on the preemption of a state law cause of action or remedy that 'regulates insurance.' That is because LMRA Section 301 does not contain any statutory exception analogous to ERISA's insurance savings provision." *Ward* Br. at 25.

III. Recent Court Decisions Contain Repeated Requests That This Court Reconsider Its Dicta In *Pilot Life*.

Ever since its issuance, *Pilot Life* has led to repeated expressions of angst among courts faced with its tragic inequities. *See Bast v. Prudential Ins. Co.*, 150 F.3d 1003, 1005 (9th Cir. 1998), *cert. denied*, 120 S.Ct. 170 (1999) ("Although this case presents a tragic set of facts, the district court properly concluded that under existing law the Basts are left without a remedy"); *Cannon v. Group Health Serv. of Okla., Inc.*, 77 F.3d 1270, 1271 (10th Cir. 1996) ("Although moved by the tragic circumstances of this case and the seemingly needless loss of life that resulted, we conclude the law gives us no choice but to affirm [the grant of summary judgment to the insurer]"); *Corcoran v. United Healthcare, Inc.*, 965 F.2d 1321, 1338 (5th Cir. 1992) ("The result ERISA compels us to reach means the Corcorans have no remedy, state or federal, for what may have been a serious mistake"); *Andrews-Clarke v.*

[17] Further, while these comments were persuasive to this Court in the context of a law of general application, they are "of little help in analyzing § 514(b)(2)(A) for . . . the saving clause is broad on its face and specific in its reference." *Metropolitan Life*, 471 U.S. at 746 n.24.

Travelers Ins. Co., 984 F. Supp. 49, 52-54, 65 (D. Mass. 1997) ("The tragic events set forth in Diane Andrews-Clarke's Complaint cry out for relief. . . . Under traditional notions of justice, the harms alleged . . . should entitle [her] to some legal remedy. . . . Nevertheless, this Court had no choice but to pluck [her] case out of the state court in which she sought redress (and where relief to other litigants is available) and then, at the behest of Travelers . . . , to slam the courthouse doors in her face and leave her without any remedy. . . . Enacted to safeguard the interests of employees and their beneficiaries, ERISA has evolved into a shield of immunity that protects health insurers . . . from potential liability for the consequences of their wrongful denial of health benefits . . . [ERISA] has gone conspicuously awry from its original intent. . . . Does anyone care? Do you?" (footnotes omitted); *Florence Nightingale Nursing Serv., Inc. v. Blue Cross & Blue Shield of Alabama*, 832 F. Supp. 1456, 1457 (N.D. Ala. 1993), *aff'd*, 41 F.3d 1476 (11th Cir. 1995); *Jordan v. Reliable Life Ins. Co.*, 694 F. Supp. 822, 827 (N.D. Ala. 1988); *see also* Donald T. Bogan, *ERISA: The Savings Clause, § 502 Implied Preemption, Complete Preemption, and State Law Remedies*, 42 Santa Clara L. Rev. 105 (concluding that saving clause saves state law insurance remedies); Bogan, *Protecting Patient Rights*, *supra* note 4, at 996-1002 (contending that Supreme Court dicta in *Pilot Life* not consistent with statutory text and legislative intent); Catherine L. Fisk, *The Last Article About the Language of ERISA Preemption? A Case Study of the Failure of Textualism*, 33 Harvard J. on Legis. 35, 38 (1996) ("It is a rich irony that ERISA, which was heralded at its enactment as significant federal protective legislation, has through its preemption provision been the basis for invalidating scores of progressive state laws.") (footnote omitted).

In *Cicio v. Does*, 321 F.3d 83, 106 (2d Cir. 2003), Justice Calabresi, in dissent, writes, " . . . the injury that the courts have done to ERISA will not be healed until the Supreme Court reconsiders the existence of consequential damages under the statute, or Congress revisits the law to

the same end." Justice Calabresi suggests that ERISA's drafters

> . . . nicely "balanc[ed] the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans." [cite]
>
> Or so Congress and ERISA beneficiaries fairly could have hoped. What they got instead was the Supreme Court's "Trail of Error," in which the Court lumped consequential and punitive damages into the misleading category of "extracontractual relief," [cite] and disallowed both by dint of an anachronistic (and historically false) law/equity distinction said to be implicit in Congress's provision for "appropriate equitable relief" in § 502(a)(3).

321 F.3d at 107.

Justice Calabresi urges the Court to reconsider its rulings limiting the form of relief available under ERISA. However, the crux of the problem is *Pilot Life*, as it is the lower courts' interpretation of that opinion which has divested claimants of the right to pursue claims directed specifically at insurance abuses and which would provide for compensatory damages.

In *Rosenbaum v. UNUM Life Ins. Co.*, *supra*, the Court looked carefully at *Pilot Life* and the language in *Moran* which related to *Pilot Life*. It found the Court's discussion of Congressional intent to be "flawed in three important respects." It failed to apply the fundamental rule of statutory construction that courts must presume that a statute means what it says (*Rosenbaum* at *7-8) and ERISA's saving clause is clear on its face that "nothing," including Sections 502 and 514, can affect state laws saved from preemption. *Id.*

> Other than the obvious requirement that the law must regulate insurance, Congress placed no other requisites or restrictions on the laws saved from preemption under ERISA's saving clause. In this regard, Congress' intent was clear, it wanted all state laws which regulate insurance to be

exempt from preemption under ERISA. The *Pilot Life* and *Rush* holdings present an implied Congressional intent which flatly contradicts this express intent. Rather than allowing any state law which "regulates insurance" to survive ERISA preemption, this implied intent adds an additional requirement, that is, the law must not offer a remedy which is not listed under § 502(a). The problem with such a requirement is that the Courts have taken an implied intent, which was derived by questionable means, and have interpreted that implied intent to overrule Congress' express intent, as reflected in the saving clause. . . .

* * *

Finally, the *Pilot Life* and *Rush* Opinions disregard the fundamental presumption against implied preemption. "[T]he historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." [cite] Here, the clear and manifest purpose of Congress was memorialized in the saving clause, which provides for state regulation to be excluded from preemption under ERISA when it "regulates insurance." To find to the contrary would supplant Congress' express intent and, in the process, would violate the spirit of the Tenth Amendment, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." U.S. Const. Amend. X

Rosenbaum at *7-9.

Justice Becker in *Difelice* also wrote in concurrence to urge this Court to reconsider its ERISA holdings, including specifically its broad preemption holding. His language is important and powerful. He notes that ERISA and Section 514 preemption have become

> . . . virtually impenetrable shields that insulate plan sponsors from any meaningful liability for negligent or malfeasant acts committed against plan beneficiaries in all too many cases. This has unfolded in a line of Supreme Court cases that have created a "regulatory vacuum" in which virtually all state law remedies are preempted but very few federal substitutes are provided.
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> * * *
>
> This "regulatory vacuum" creates situations in which plan beneficiaries have little or no recourse for even the most egregious violations of their rights. . . .
>
> * * *
>
> The unavailability of extracontractual damages has effects that are perverse. . . . it creates strong incentives for HMOs to deny claims in bad faith or otherwise "stiff" participants. ERISA preempts the state tort of bad-faith claim denial, *see, Pilot Life,* 481 U.S. at 54-56, 107 S.Ct. 1549, so that if an HMO wrongly denies a participant's claim even in bad faith, the greatest cost it could face is being compelled to cover the procedure, the very cost it would have faced had it acted in good faith. Any rational HMO will recognize that if it acts in good faith, it will pay for far more procedures than if it acts otherwise, and punitive damages, which might otherwise guard against such profiteering, are no obstacle at all. Not only is there an incentive for an HMO to deny any particular claim, but to the extent that this practice becomes widespread, it creates a "race to the bottom" in which, all else being equal, the most profitable HMOs will be those that deny claims most frequently.

Difelice, 346 F.3d at 456-462.

Justice Becker believes that the bar to extracontractual damages has led to an ERISA "preemption nightmare" and suggests that the Supreme Court revisit its preemption analysis. He explains that ERISA's legislative history, upon which *Pilot Life* is based, is hardly clear, and that the preemption clause was inserted at the last minute

and with little Congressional debate. *Id.* at 466. He concludes:

> The evidence suggests that Congress did not carefully consider whether the scope of preemption should reflect the different degrees of federal regulation of pension plans and welfare benefit plans. *See* Fisk, *The Last Article about the Language of ERISA Preemption?,* 33 Harv. J. on Legis. at 56. In my view, section 514(a)'s broad preemptive scope is sensible with regard to pension plans, for federal law fully displaces state law and provides vesting, requirements, minimum funding requirements, and a raft of other employee safeguards. However, to me, it makes much less sense with respect to welfare plans. As discussed *supra,* Congress exempted welfare benefit plans from most of ERISA's substantive regulations, such as its vesting and minimum funding requirements.
>
> As I see it, it is unlikely that Congress intentionally created this so-called "regulatory vacuum," in which it displaced state-law regulation of welfare benefit plans while providing no federal substitute. The more likely explanation is that Congress merely intended to create minimum safeguards to protect the financial integrity of welfare benefit plans while stopping short of federalizing the entire remedial regime, especially in light of what was a workable state-law remedial system. Congress's failure to distinguish explicitly between pension and welfare benefit plans in § 514(a) is understandable, for, as explained above, the managed care plans that wreak havoc with § 514(a) as it relates to welfare benefit plans did not exist when ERISA was enacted. There is no evidence that Congress envisioned the current situation.

Id. at 467.

Undoubtedly these eminent jurists have gone to great lengths to speak out because of their firm belief that *Pilot Life* is a flawed decision and that the repeated tragic consequences of that decision are so innumerable and have gone so far as to cry out for this Court's intervention. They recognize, as we discuss below, that the legislative history is clear that Congress did not intend that ERISA preempt state laws which are saved from preemption and that to do so makes little sense.

IV. ERISA's Legislative History Is Unequivocal In Disclosing That The Act Was Intended To Regulate Pension Benefits And Was Not Intended To Impact The Field Of Insurance.[18]

As this Court has recognized, ERISA was a massive legislative undertaking. *Pilot Life,* 481 U.S. at 44. Yet, the briefing regarding the legislative history before the Court in *Pilot Life* was nearly non-existent. This Court relied on the last two pages of the Solicitor General's short brief supporting the grant of certiorari. *Id.* at 52. However, none of the other briefs in the case discussed the legislative history at all. Thus, no one sought to assist the Court in presenting the lengthy legislative history, which conflicts with that presented in the Solicitor General's original brief. Moreover, as noted above, the Solicitor General has since changed his view on the proper interpretation of ERISA's legislative history. When one views that history in context, it is plain that there is nothing in that history to support an implied Congressional intent which is contrary to the plain words of the statute itself.

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[18] *See generally* Subcomm. on Labor of the Senate Comm. on Labor and Pub. Welfare, 94th Cong., Legislative History of the Employee Retirement Income Security Act of 1974 (Comm. Print 1976) [hereinafter "Legislative History"]; Special Comm. on Aging, U.S. Senate, 98th Cong., The Employment Retirement Income Security Act of 1974: The First Decade 1-25 (Comm. Print 1984) [hereinafter "The First Decade"].

The legislative history discussed herein is carefully and extensively set forth in greater detail in Bogan, *Protecting Patient Rights, supra,* 74 Tul. L. Rev. 951; *See also* David Gregory, *The Scope of ERISA Preemption of State Law: A Study in Effective Federalism,* 48 U. Pitt. L. Rev. 427, 437-457 (1987).

ERISA was the direct outgrowth of the explosion in private pension plans during the middle of the last century. The number of employees covered by such plans grew from approximately 4 million in 1940 to over 30 million by 1973.[19] The estimated assets held by such plans during this same period grew from $2.4 billion to $150 billion.[20] With this explosive growth came a similarly expansive growth in the abuses of such funds.[21] In addition, the enormous accumulation of such funds exerted a major impact on the country's financial markets.[22] This explosion occurred without the benefit of any effective federal or state regulation.[23]

In 1954, at the request of President Eisenhower, Congress undertook an extensive study of the private pension industry.[24] This study disclosed abuses, including incompetent management of pension funds, looting, embezzlement, kickbacks, excessive administration costs and imprudent investment practices.[25] In response, Congress enacted the

[19] *See* S. Rep. No. 93-127, at 3, *reprinted in* 1974 U.S.C.C.A.N. at 4839-40, and in 1 Legislative History, *supra* note 18, at 589.

[20] *See* H.R. Rep. No. 93-533, at 3, *reprinted in* 1974 U.S.C.C.A.N. at 2350; The First Decade, *supra* note 18, at 5; 4641, and in 2 Legislative History, *supra* note 18, at 5; James D. Hutchinson & David M. Ifshin, *Federal Preemption of State Law Under the Employee Retirement Income Security Act of 1974*, 46 U. Chi. L. Rev. 23, 24 (1978).

[21] *See* 120 Cong. Rec. 29,934 (1974), *reprinted in* 3 Legislative History, *supra* note 18, at 4748 (statement of Sen. Javits); The First Decade, *supra* note 18, at 6 n.22 (citing congressional hearings on abuse in pension plan administrations); *see also* David Gregory, *The Scope of ERISA Preemption of State Law: A Study in Effective Federalism*, *supra* note 18, at 443-45 (referring to the many abuses in employee pension plans listed in ERISA's legislative history).

[22] *Id*; H.R. Rep. No. 93-533, at 3, *reprinted in* 1974 U.S.C.C.A.N. at 4641, and in 2 Legislative History, *supra* note 18, at 2350.

[23] *See* note 17 *supra*.

[24] *See* S. Rep. No. 85-1440, at 2-11 (1958), *reprinted in* 1958 U.S.C.C.A.N. 4137.

[25] *Id*. at 4137-47

Welfare and Pension Plans Disclosure Act in 1958.[26] This law merely required the disclosure of certain financial information to the employees and did not provide any meaningful regulation of the funds themselves.[27]

This legislation was wholly ineffective.[28] Consequently, in 1962 President Kennedy appointed a special task force to study the problem.[29] The task force concluded that further federal regulation of private pension plans to include mandatory minimum vesting and funding requirements was necessary and that further study was required on other issues.[30] Significantly, the task force specifically did not investigate or consider any reforms of nonpension plans, such as health insurance plans.[31] In response to these concerns, New York Senator Jacob Javits

[26] Pub. L. No. 85-836, 72 Stat. 997 (1958) (repealed 1974).

[27] *See* H.R. Rep. No. 93-533, at 4, *reprinted in* 1974 U.S.C.C.A.N. at 4642, and in 2 Legislative History, *supra* note 18, at 2351; *Malone v. White Motor Corp.*, 435 U.S. 497, 507 (1978) (plurality opinion).

[28] *See* S. Rep. No. 93-127, at 4, *reprinted in* 1974 U.S.C.C.A.N. at 4841; H.R. Rep. No. 93-533, at 4, *reprinted in* 1974 U.S.C.C.A.N. at 4642, and in 2 Legislative History, *supra* note 18, at 2351.

[29] *See* President's Comm. on Corporate Pension Funds and Other Private Retirement and Welfare Programs, Public Policy and Private Pension Programs: A Report to the President on Private Employee Retirement Plans, at vii-viii (1965) [hereinafter "President's Committee Report"]; *see also* The First Decade, *supra* note 16, at 8-10 (describing the formation of the committee and its findings).

[30] *Id*.

[31] *See* President's Committee Report, *supra* note 27, at iv ("Although the area of investigation assigned to the Committee included welfare plans as well as retirement programs, the President's memorandum specifically raised questions about issues which arise primarily from retirement plans. Other types of welfare plans, such as health and insurance plans, make important contributions to the economic security of American workers; they do not, however, have the impact of pension plans on accumulation of savings, labor mobility, and similar matters touched upon by the President. Consequently, the Committee has confined its efforts to an inquiry into private employee retirement plans (i.e. excluding plans for self-employed persons) without any extensive study of other types of welfare plans.").

introduced legislation in 1967 to create federal funding and participation requirements for private pension plans.[32] This led to further Congressional investigations and eventually ERISA. In 1970, the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare began a three-year study "undertaken to ascertain the need for statutory protections for workers' pension programs and to formulate appropriate corrective legislation."[33] Like the previous investigations, the subcommittee's hearings disclosed a morass of abusive practices resulting in the loss of retirement benefits to employees as the result of inadequate funding, mismanagement and unreasonable vesting requirements.[34] It agreed with President Kennedy's task force and recommended comprehensive regulation of the pension industry.[35] Shortly thereafter, Senator Javits introduced Senate Bill 4. It stated, "[t]he purpose of S.4 is to prescribe legislative remedies for the various deficiencies existing in the private pension plan systems which have been determined by the Senate Subcommittee's comprehensive study of such plans."[36] A corresponding House bill was also introduced.[37]

[32] *See* 113 Cong. Rec. 4650-53 (1967) (statement of Sen. Javits); *see also* 120 Cong. Rec. 29,933-34 (1974), *reprinted in* 3 Legislative History, *supra* note 18, at 4748 (remarks of Sen. Javits) (recounting his continued efforts to reform the private pension and welfare system).

[33] *See* S. Rep. No. 92-634, at 1 (1972); *see also* 119 Cong. Rec. 30,003 (1973), *reprinted in* 2 Legislative History, *supra* note 18, at 1598 (statement of Sen. Williams).

[34] *See* H.R. Rep. No. 93-533, at 5-8 (1973), *reprinted in* 1974 U.S.C.C.A.N. at 4639, 4643-46, and in 2 Legislative History, *supra* note 18, at 2355.

[35] *See* 120 Cong. Rec. 29,935-44 (1974), *reprinted in* 3 Legislative History, *supra* note 18, at 4748 (remarks of Sen. Javits).

[36] S.4, 93d Cong. (1973); *see* S. Rep. No. 93-127 (1973), at 1, *reprinted in* 1974 U.S.C.C.A.N. at 4838, and in 1 Legislative History, *supra* note 18, at 587.

[37] *See* H.R. 2, 93d Cong. (1973), *reprinted in* 1 Legislative History, *supra* note 18, at 3.

These bills were sent to their appropriate committees, which issued their own reports. Each of these reports concerned themselves solely with abuses in and the consequent need for regulation of private pension plans.[38] The Senate Committee on Labor and Public Welfare report states:

> The provisions of S.4 are addressed to the issue of whether American working men and women shall receive private pension plan benefits which they have been led to believe would be theirs upon retirement from working lives. It responds by mandating protective measures and prescribing minimum standards for promised benefits. The purpose of S.4 is to prescribe legislative remedies for the various deficiencies existing in the private pension plan systems . . . .[39]

The report states that "[t]he principal issues affecting the vital and basic needs for legislative reform involve consideration of the essential elements of pensions: (1) 'vesting,' (2) 'funding,' (3) 'reinsurance,' (4) 'portability' and (5) 'fiduciary responsibility and disclosure.'"[40] Similarly, the House Committee on Education and Labor report states that the "primary purpose of the bill is the protection of individual pension rights" and that the legislation was designed to: (1) establish minimum fiduciary standards for retirement plans, (2) provide for enforcement and public disclosure of finances, (3) improve the equitable

[38] *See* S. Rep. No. 93-127, at 1-36, *reprinted in* 1974 U.S.C.C.A.N. at 4838-89, and in 1 Legislative History, *supra* note 18, at 587-622; H.R. Rep. No. 93-533, at 1-28, *reprinted in* 1974 U.S.C.C.A.N. at 4639-70, and in 2 Legislative History, *supra* note 18, at 2348-75; 120 Cong. Rec. 29,933-35 (1974), *reprinted in* 3 Legislative History, *supra* note 18, at 4746-51 (remarks of Sen. Javits).

[39] S. Rep. No. 93-127, at 1, *reprinted in* 1974 U.S.C.C.A.N. at 4844-77, and in 1 Legislative History, *supra* note 18, at 587.

[40] S. Rep. No. 93-127, at 8-11, *reprinted in* 1974 U.S.C.C.A.N. at 4844-77, and in 1 Legislative History, *supra* note 18, at 594-97 (emphasis omitted).

character and soundness of private pension plans by requiring (a) appropriate vesting and (b) minimum funding standards, and (4) guarantee the adequacy of the plan's assets prior to termination.[41]

ERISA's legislative history is unequivocal that it was intended as a pension reform bill. In describing ERISA, Senator Javits said, "[T]he pension reform bill is the greatest development in the life of the American worker since social security. For the first time in our history most workers will be able to truly retire at retirement age and live decently on their social security and private pensions."[42] Senator Williams, Chairman of the Senate Committee on Labor and Public Welfare, described his committee's study which lead to ERISA. "This study clearly established that too many workers, rather than being able to retire in dignity and security after a lifetime of labor rendered on the promise of a future pension, find that their earned expectations are not to be realized."[43] In the House, one of the principal proponents, Representative Dent, described ERISA's purpose in this way: "[W]e started out with only one aim in view and that was to give a pension participant his entitlements under the contract of the pension plan he belonged to."[44] The record is filled with tragic examples of workers deprived of pension benefits after 30, 40 and 50 years of employment because they were a few days short of vesting before retiring, the company was sold or went bankrupt, or because the

[41] H.R. Rep. No. 93-533, at 1, 17-18, *reprinted in* 1974 U.S.C.C.A.N. at 4655-56, and in 2 Legislative History, *supra* note 18, at 2348, 2364-65.

[42] Legislative History, *supra* note 18, at 4747 (Remarks of Sen. Javits).

[43] Legislative History, *supra* note 18, at 4733 (Remarks of Sen. Williams).

[44] Legislative History, *supra* note 18, at 4665 (Remarks of Rep. Dent).

employer could not afford to pay the promised retirement benefits.[45]

While this Court has referred to ERISA as a "comprehensive and reticulated statute,"[46] it is so only with respect to pension plans, and the Court's description of the Act as such a statute originated in the context of pension cases.[47] The Act substantially regulated pension plans but contained virtually no meaningful regulation of insurers or insurance "plans."

What is clear from this long and extensive legislative history and the statute itself is that the exclusive concern of Congress in passing ERISA was to address abuses in the pension field. Not a single insurance concern is expressed anywhere in the legislative history. Instead, Congress expressly saved all insurance regulation to the States. This Court has endorsed this view, noting that the broad preemption clause was added at the last minute, that there is no legislative history discussing the relationship between the saving clause and the general preemption clause, and that there is a "complete absence of evidence" to support a narrow reading of the saving clause. *Metropolitan Life*, 471 U.S. at 745-46 n.21. As one commentator who has extensively reviewed ERISA's legislative history reports,

> . . . ERISA's legislative history is remarkable . . . for what it does not contain. ERISA's legislative

[45] *See, e.g.*, Legislative History *supra* note 18, at 4749-50 (Remarks of Sen. Javits on "Why Pension Reform Is Needed), (4791-96 (Remarks of Sen. Bentson), (4664-65) (Remarks of Rep. Thompson), (4710) (Remarks of Rep. McClory); *Interim Report of Activities of the Private Welfare and Pension Plan Study, Subcommittee On Labor of the Committee on Labor and Public Welfare*, S. Rep. No. 92-634, 92d Cong., 2d Sess. (1972) at 67-90.

[46] *See, e.g., Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510 (1981); *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 361 (1980).

[47] *Id.*

history provides no evidence that Congress seriously investigated, studied, or debated any issues or concerns with nonpension employee benefit plans.

* * *

There is no documentation anywhere in ERISA's legislative history of any study or investigation of the history or growth of nonpension benefit plans, or of any specific concern with the management of nonpension plan assets. Further, ERISA's legislative history fails to disclose any concerted investigation of any complaints about nonpension benefits, such as inadequate health care, accident, death or disability coverage, or problems with health, life, or disability benefits claims. In short, Congress just was not dealing with nonpension benefit plans when it enacted ERISA.

Bogan, *Protecting Patient Rights, supra,* note 4 at 972, 976-77.

CONCLUSION

ERISA's statutory history as pension reform legislation is unequivocal. Its language saving any state law regulating insurance is unambiguous and, because ERISA was not intended to regulate insurance, it fails to provide a meaningful remedy to resolve insurance disputes. As many Courts and commentators have now requested, this Court should revisit the wisdom of its dicta in *Pilot Life* and disapprove the analysis set forth therein.

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